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possession of which he has not assumed, should prevail in the absence of some countervailing social interest calling for absolute liability; and that his responsibility should be limited to the exercise of reasonable care in the safe keeping of the goods and in effecting a return to the owner, with a corresponding lien for proper expenditures in so doing.

JURISDICTION TO TAX INCOME AS AFFECTED BY CHANGE OF DOMICIL.

— When a taxpayer has acquired his domicile within the taxing state during the fiscal period for which an income tax is levied, the question has been raised as to the jurisdiction of this state to tax income received during the fiscal period but prior to the acquisition of the present domicile.¹ To arrive at an answer, it is necessary to consider the various forms of tax which may be imposed under the name of an income tax,² and the ability of the state to make the operation of each, in effect, retroactive.³

Income is property acquired by creation from other property or by transfer.⁴ As a matter of theory, therefore, it is conceivable that an income tax may be laid as a personal tax upon the person receiving the income; as an excise upon the transaction by which it is gained; or as a property tax, either upon the property from which it has been created, or upon the income itself as property.

A personal tax may normally be levied at the domicile of the taxpayer at the time at which liability for the tax is created.⁵ This is true even when the amount of the tax on the person is measured by the value of his property situated abroad,⁶ except only if it be land⁷ or tangible⁸ personalty having a permanent⁹ foreign *situs*.¹⁰ But

¹ *Hart v. Tax Commissioner*, 132 N. E. 621 (Mass., 1921). For the facts of this case, see RECENT CASES, *infra*, p. 889.

² Often a single income tax law imposes more than one kind of tax. Thus a law which taxes the income of non-residents acquired within the state, and also the foreign acquisitions of residents, imposes either an excise or a property tax by the first provision and a personal tax by the second. The legislative intent as to the kind of tax must be ascertained by the practical effect. It not infrequently happens, however, that a limitation on the legislative power to impose one kind or another is created by some provision in the state constitution. See Opinion of the Justices, 220 Mass. 613 (1915).

³ See Rugg, C. J., in *Tax Commissioner v. Putnam*, 227 Mass. 522, 526, 116 N. E. 904, 907 (1917); *Maguire v. Tax Commissioner*, 230 Mass. 503, 512, 120 N. E. 162, 166 (1918).

⁴ See *Shaffer v. Carter*, 252 U. S. 37, 50 (1919); Opinion of the Justices, *supra*, at 624.

⁵ *Kuntz v. Davidson County*, 6 Lea (Tenn.) 65 (1880). See 31 HARV. L. REV. 786.

⁶ The tax is usually said to be based on the doctrine *mobilia sequuntur personam*. This doctrine is entirely a fiction, however, and the real nature of the tax is a tax on the person. *McKeen v. Northampton*, 49 Pa. 519 (1865). See 32 HARV. L. REV. 168.

⁷ *Louisville, etc. Ferry Co. v. Kentucky*, 188 U. S. 385 (1902); *Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132 (1889).

⁸ Intangible personalty, even though it has such a "business *situs*" in another state as to be taxable there, may be included in the property with respect to which the owner is taxed at his domicile. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54 (1917).

⁹ The owner is taxable with respect to tangible personalty which has not acquired a permanent *situs* abroad. *Coe v. Errol*, 116 U. S. 517 (1886); *Bemis v. Boston*,

¹⁰ *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905).

when it is attempted to levy an income tax with respect to that part of the taxpayer's income which was accumulated before his change of domicile, the question is not merely one as to the taxability of income acquired abroad,¹¹ but is complicated by the fact that often ownership has ceased before acquisition by the taxing state of jurisdiction over the person. The fairness of a tax measured by property owned when the liability for the tax arises is apparent, since payment may be made out of that property. But it seems arbitrary and hardly according to "due process"¹² to make its amount dependent on the ownership of property with respect to which throughout the entire period¹³ of ownership the taxpayer had no notice of the imposition or pending imposition of a liability.¹⁴

If the tax is in the nature of an excise,¹⁵ it may be imposed only¹⁶ at the place at which the income accrues.¹⁷ The state is powerless to impose a tax on an act abroad¹⁸ or a privilege conferred by foreign law,¹⁹ and accordingly the state of the domicile may impose an excise only if the taxable operation takes place within its borders.

14 Allen (Mass.) 366 (1867). The test of exemption from a tax at the domicile seems to be that it will be granted if the property is subject to taxation abroad. See *New York Cent. R. R. v. Miller*, 202 U. S. 584, 597 (1905).

¹¹ Taxability at the domicile with respect to income acquired and received abroad has under some circumstances at least long been recognized as proper. *Memphis, etc. R. Co. v. U. S.*, 108 U. S. 228 (1882). Taxability of income at the place of its creation is also undisputed. *Shaffer v. Carter*, *supra*. But this rule is somewhat anomalous, for ordinarily a fair degree of permanence within the jurisdiction is requisite. See J. H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 597 *et seq.* Accordingly, though the test indicated by the Supreme Court since the *Union Refrigerator Transit Co.* case of taxability at the domicile with reference to tangible property situated abroad was whether or not it was subject to taxation elsewhere, it seems doubtful whether this test will be applied to income. See *Maguire v. Tax Commissioner*, *supra*. Nevertheless, if the income is tangible and at once acquires a permanent *situs* abroad, the owner is not, consistently with the principle of the *Union Refrigerator Transit Co.* case, taxable with respect to it at his domicile. See *Union Ref. Transit Co. v. Kentucky*, *supra*, at 202.

¹² As to the effect of the Fourteenth Amendment on the power of states to tax, see I COOLEY, TAXATION, 3 ed., 55 *et seq.*

¹³ Because income is often quickly dissipated, but nevertheless a tax is levied with respect to all that which is acquired throughout the fiscal period, liability for the tax must be created at the moment at which the income is acquired. *Cf. Mandell v. Pierce*, 3 Cliff. 134, 16 Fed. Cas. No. 9008 (D. Mass., 1868). There, the taxpayer having died within the fiscal period, his personal representative was required to make a return of the income received up to the time of his death.

The mere fact that if the state of the new domicile was allowed to impose a tax for the entire period a double liability would result, is no argument against the tax. See GRAY, LIMITATIONS OF TAXING POWER, §§ 163, 1377-1379.

¹⁴ But see *Stockdale v. Ins. Co.*, 20 Wall. (U. S.) 323, 331 (1873), *contra*. As to personal taxes on non-residents, see 34 HARV. L. REV. 542.

¹⁵ The federal income tax is of this nature. *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1 (1915). See 29 HARV. L. REV. 536.

¹⁶ An excise cannot be levied on the receipt of income already acquired. See 35 HARV. L. REV. 70, 72.

¹⁷ *Shaffer v. Carter*, *supra*, at 52; *Stratton's Independence, Ltd. v. Howbert*, 231 U. S. 399 (1913).

¹⁸ *Robinson v. Norfolk*, 108 Va. 14, 60 S. E. 762 (1908).

¹⁹ *Westfeldt's Succession*, 122 La. 836, 48 So. 281 (1909); *Matter of Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893). *Cf. Ins. Co. v. Comm.*, 87 Pa. St. 173 (1878); *Bullen v. Wisconsin*, 240 U. S. 625 (1915). But an excise may be imposed on the local act of

A tax is seldom imposed upon property measured exclusively by the value of the income it produces, because generally there is a provision in the state constitution requiring that taxes on property be on an *ad valorem* basis and prohibiting double taxation.²⁰ Nevertheless, such a tax is conceivable. But since property in another jurisdiction is not taxable,²¹ the result in any case depends, not on the domicile of the owner, but on the *situs* of the property.²² If the latter has changed, a problem somewhat similar²³ to that occasioned by change of domicile when the tax is on the person, might be raised. The amount of the income is material only to establish the measure of the tax. The time of its accumulation can, therefore, have no bearing on the jurisdiction of the state to levy a tax on the property itself. In the case of an ordinary *ad valorem* tax on property, the length of time the property has been within the jurisdiction has no influence on the amount²⁴ of the tax, and this principle cannot be altered by the fact that the income it produces is made the basis of its valuation. Thus, while the tax may be measured by the value of income accumulated abroad, the jurisdiction to levy it is determined not by any principles relating to the taxability of income but solely on ability to tax the property itself.

In the more usual type of income levied tax as a property tax, the tax is on the income itself.²⁵ Here, again, jurisdiction to tax depends upon jurisdiction over property, *i.e.*, the income, and not the domicile of the owner.²⁶ But if there is a change of domicile, and the taxpayer introduces a part of the income received at the old domicile into the new, there may be a question as to whether this is taxable under the income tax law of the new. The tax is laid upon all income received or accrued²⁷ during the preceding year and not merely upon that residuum which remains to the taxpayer on the day the return is made. Therefore, the intent of the statute is generally to affix the obligation to pay the tax at the instant the income is acquired.²⁸ Ordinarily, in order to lay a tax upon property, it is necessary to show that it is more than temporarily within the state.²⁹ But because of the peculiarly unstable character of this property, it seems sufficient that the state rendering protection at the

a non-resident with respect to property abroad. *People v. Reardon*, 184 N. Y. 431, 77 N. E. 970, *affd.*, 204 U. S. 152 (1906).

²⁰ See 1 COOLEY, TAXATION, 3 ed., 274; JUDSON, TAXATION, 2 ed., § 503, pp. 769 *et seq.*

²¹ State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300 (1872).

²² Louisville, etc. Ferry Co. v. Kentucky, *supra*; Bittering's Estate, *supra*.

²³ The problem is not the same. A tax on a person must be based on his ability to pay. A tax on property is not; it is on the property itself, measured by value.

²⁴ Time is important in determining whether jurisdiction has been acquired at all. But once acquired, the jurisdiction is complete.

²⁵ *Wilcox v. Middlesex County*, 103 Mass. 544 (1870). The law under which the tax was imposed in the principal case was a tax of this kind. See *Maguire v. Tax Commissioner*, *supra*. See *Maguire v. Trefry*, 253 U. S. 12 (1920).

²⁶ See 32 HARV. L. REV. 168.

²⁷ Whether it is income accrued or only income actually received depends generally upon the manner in which the law is administered.

²⁸ Cf. *Mandell v. Pierce*, *supra*. If the income is used to purchase property, this property is taxable in addition to the income, despite a constitutional prohibition against double taxation. *Lott v. Hubbard*, 44 Ala. 593 (1870).

²⁹ See note 11, *supra*.

vital moments of its creation³⁰ or its receipt³¹ has jurisdiction to tax it, regardless of the intent of its owner as to its future location. If past accumulated income is brought into the state, however, the protection afforded is analogous rather to that given ordinary chattels than to that given peculiarly to income as income; and jurisdiction to tax should depend on the same principles as does that to tax ordinary personalty.

It appears thus that, regardless of the character of the tax its laws impose, the jurisdiction of the state of the new domicile to tax income is limited, except in the rare case mentioned, either by the actual lack of jurisdiction or the prohibition on its exercise placed by the Fourteenth Amendment, to the levy of a tax on or with respect to only so much of the total income as was acquired after the acquisition of the new domicile.³²

RECENT CASES

BANKRUPTCY — PREFERENCES — LIABILITY OF TRUSTEE FOR TAX LEVIED AFTER THE ADJUDICATION. — In March, 1919, B was adjudicated a bankrupt. In September, 1919, Wisconsin passed a law levying a tax on 1918 incomes. Under the Bankruptcy Act, which provides for priority of payment of taxes due and owing from the bankrupt to the state, Wisconsin sought an order directing the payment of this tax. (1913 U. S. COMP. STAT., § 9648). *Held*, that the trustee in bankruptcy should pay the tax. *Matter of Borden Company, Bankrupt*, 47 A. B. R. 396 (7th Circ.).

The provision in the Bankruptcy Act for the payment of taxes does not specify the time when they must be due and owing, but this is interpreted to mean at the time of the adjudication. *First National Bank v. Aultman*, 12 A. B. R. 12 (N. D. Ohio). See *New Jersey v. Anderson*, 203 U. S. 483, 494; *In re Sherwoods*, 210 Fed. 754, 758 (2d Circ.). The principal case does not satisfy this requirement. Nor is it aided by the interpretation that it is sufficient if a tax is assessed though it is not yet collectible. See *In re William F. Fisher & Co.*, 148 Fed. 907, 912 (D. N. J.); *Matter of Ramirez*, 39 A. B. R. 320, 323 (D. P. R.). It is true that a trustee in bankruptcy is liable for current taxes on property in his possession. *Swarts v. Hammer*, 120 Fed. 256 (8th Circ.). This liability is generally treated as governed by the provision of the Bankruptcy Act relating to the payment of taxes. *In re Sims*, 118 Fed. 356 (W. D. Ga.). But it would seem better to treat it not as a tax but as an expense of administration. So treated it is clear that no analogy in support of the result of the principal case can be drawn from the trustee's liability for current taxes. *Cf. First National Bank v. Aultman, supra; Matter of Emmerman v. Ohio Steel Specialty Co.*, 13 A. B. R. 40 n. (N. D. Ohio).

BANKRUPTCY — PROCEDURE AND PRACTICE — CLAIM FOR FEDERAL TAXES BARRED IF NOT FILED WITHIN A YEAR AFTER ADJUDICATION. — X, then owing federal income taxes for the previous year, filed a voluntary petition in bankruptcy and was duly adjudicated a bankrupt. More than a year after the

³⁰ *Shaffer v. Carter, supra.*

³¹ *Maguire v. Tax Commissioner, supra; Maguire v. Trefry, supra.*

³² Conversely, in each case the state of the old domicile should have jurisdiction to tax that part, or with respect to that part, of the income which was acquired before the change. If the state of the old domicile purported to affix the liability as a tax on the parent property at the instant the income was created, it would in effect be a tax on the income. At all events it would be unobjectionable. See note 13, *supra*.